(1) 02-112

Supreme Court, U.S.
FILED
JUL 22 2002

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

VICENTE PINEDA-TORRES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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39 pgs

QUESTION PRESENTED

Whether expert testimony concerning the structure and modus operandi of drug-trafficking organizations is categorically prohibited by the Federal Rules of Evidence in a prosecution of a drug courier for importation of narcotics.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 287 F.3d 860.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND RULES INVOLVED

Pertinent statutory provisions—21 U.S.C. 841(a), 952(a), and 960(a)—and Federal Rules of Evidence 401, 402, 403, and 702 are set forth in the Appendix. App., *infra*, 28a-32a.

STATEMENT

Following a jury trial, respondent was convicted in the United States District Court for the Southern District of California of importation of marijuana in violation of 21 U.S.C. 952 and 960, and possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 37 months imprisonment, to be followed by three years supervised release, and a $200 special assessment. The court of appeals reversed the convictions, App., *infra*, 1a-12a, on the ground that the district court erred in admitting expert testimony concerning the structure of drug trafficking organizations.

1. On August 2, 2000, respondent was driving a car from Mexico into the United States when he was stopped at the San Ysidro Port of Entry near San Diego. During a routine inspection, a U.S. Customs Inspector questioned respondent about his citizenship and the ownership of the vehicle he was driving. When respondent appeared nervous, the Customs Inspector brought a drug sniffing dog to his car, and the dog alerted to the dashboard. A further search of the car revealed 23 packages of marijuana weighing 42.7 pounds hidden behind the glove compartment. See App., *infra*, 3a.

2. On August 16, 2000, respondent was charged with importation of marijuana, in violation of 21 U.S.C. 952 and 960, and possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Both

counts required the government to prove, *inter alia*, that respondent "knowingly or intentionally" engaged in the alleged criminal conduct. 21 U.S.C. 841(a), 960(a)(1).

Before trial, the government provided notice of its intent to introduce expert testimony about the structure of drug trafficking organizations and, in particular, testimony that the person who loads the vehicle with drugs usually is not the person who drives the drugs across the border. Respondent moved to exclude the evidence pursuant to, *inter alia*, Federal Rules of Evidence 401, 403, and 702. Following a hearing, the district court ruled that it would allow the expert testimony. App., *infra*, 4a.

3. A two day trial followed. The government presented the testimony of an Immigration and Naturalization Service (INS) Inspector and two U.S. Customs Service employees concerning the discovery of the drugs in respondent's car, and testimony of a forensic chemist who identified the drugs. In addition, the government called Special Agent Robert Villars of the U.S. Customs Service as an expert in marijuana smuggling. Respondent renewed his objection to the testimony under Rules 401 and 403, but the district court allowed it. Special Agent Villars testified about the "compartmentalization" of the smuggling process, stating that each participant has a separate role, and that the person who loads the vehicle with marijuana is not the person who drives the vehicle across the border. App., *infra*, 4a-5a. He further explained that, given the separation in functions, fingerprinting generally is not a valuable law enforcement tool in identifying drug couriers. *Ibid.*

During respondent's cross examination of the government's witnesses and his closing arguments, counsel

referred both directly and indirectly to the absence of fingerprint or other physical evidence tying respondent to the drugs. See App., *infra*, 16a-17a, 21a-22a, 24a, 26a-27a. On November 8, 2000, the jury returned guilty verdicts on both counts.

4. The court of appeals reversed the convictions and remanded. App., *infra*, 1a-12a. The court held that the admission of Special Agent Villars's testimony required reversal under *United States* v. *Vallejo*, 237 F.3d 1008, amended by 246 F.3d 1150 (9th Cir. 2001). As the court explained, "*Vallejo* * * * held that the admission of expert testimony about the structure of drug trafficking organizations violates Federal Rules of Evidence 401 and 403 'whe[n] the defendant is not charged with a conspiracy to import drugs or whe[n] such evidence is not otherwise probative of a matter properly before the court.'" App., *infra*, 5a. The court stated that "[t]he case before us is, in almost all respects, similar to [*Vallejo*]." *Ibid.* In addition, the court relied on its decision in *United States* v. *McGowan*, 274 F.3d 1251 (9th Cir. 2001), petition for cert. pending, No. 02-64 (filed July 12, 2002), in which the court—applying the holding in *Vallejo*—concluded that the admission of "virtually identical expert testimony" by the same expert (Special Agent Villars) "was reversible error." App., *infra*, 7a n.3; see *id.* at 5a-7a.

ARGUMENT

This case presents the question whether expert testimony concerning the structure and modus operandi of drug trafficking organizations is categorically prohibited by the Federal Rules of Evidence in the prosecution of a drug courier for importation of narcotics. In holding that the admission of such expert testimony was reversible error in this case, the court of appeals

specifically relied on its decisions in *United States* v. *McGowan*, 274 F.3d 1251 (9th Cir. 2001), petition for cert. pending, No. 02-64 (filed July 12, 2002), and *United States* v. *Vallejo*, 237 F.3d 1008, amended by 246 F.3d 1150 (9th Cir. 2001). App., *infra*, 5a-6a. On July 12, 2002, the United States filed a petition for certiorari in *McGowan*, presenting the same question in this case and, in particular, requesting this Court's review of the categorical rule established by the Ninth Circuit in *Vallejo*. In both *McGowan* and in this case, the court of appeals held that the rule of *Vallejo* required invalidation of convictions obtained under 21 U.S.C. 841(a)(1), 952, and 960. Because the question presented in this case is before the Court in *McGowan*, the petition for a writ of certiorari should be held pending the Court's disposition in that case.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of *United States* v. *McGowan*, No. 02-64, and then should be disposed of as appropriate in light of the disposition in that case.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

JULY 2002

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-50133

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

VICENTE PINEDA-TORRES, DEFENDANT-APPELLANT

[Filed: Apr. 23, 2002]

Before: REINHARDT and TALLMAN, Circuit Judges, and DAMRELL,* District Judge

Vicente Pineda-Torres appeals his convictions for importation of marijuana in violation of 21 U.S.C. §§ 952 and 960 and possession of marijuana with the intent to distribute in violation of 21 U.S.C. § 841(a)(1). He argues that the district court abused its discretion when it admitted expert testimony regarding the structure of drug trafficking organizations in a simple, non-conspiracy importation case. Because we hold that the

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* The Honorable Frank C. Damrell, Jr., United States District Judge for the Eastern District of California, sitting by designation.

district court committed prejudicial error when it admitted this expert testimony, we reverse.[1]

I. BACKGROUND

Vicente Pineda-Torres had just entered the United States from Mexico by automobile when he was stopped at the primary inspection area at the San Ysidro Port of Entry. Customs Inspector Cruz approached his vehicle and asked him about his citizenship. Pineda-Torres presented his INS documents, which showed that he was a permanent resident of Southern California, and told the inspector that he was returning from visiting a friend in Tijuana. When Inspector Cruz asked him who

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[1] Pineda-Torres also argues that the district court erred by (1) denying his motion for judgment of acquittal on the importation charge because the government failed to prove that he actually crossed the border and "brought the marijuana" into the United States; (2) failing to dismiss the indictment due to the invalid appointment of the United States Attorney in violation of the Appointments and Vacancies Clause of the Constitution of the United States; and (3) failing to dismiss the indictment because 21 U.S.C. §§ 841 and 960 are facially unconstitutional under *Apprendi* v. *New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000).

First, we reject Pineda-Torres's claim that there was insufficient evidence to convict him of importation. Customs Inspector Cruz testified that Pineda-Torres had already crossed the border into the United States when he was stopped at the primary inspection area. Second, Pineda-Torres's argument that the United States Attorney's appointment violates the Appointments and Vacancies Clause is precluded by this court's holding in *United States* v. *Gantt*, 194 F.3d 987, 999 (9th Cir. 1999). Third, in light of our recent decisions in *United States* v. *Buckland*, 277 F.3d 1173 (9th Cir. 2002) (en banc), and *United States* v. *Mendoza-Paz*, No. 00-50029, 2002 WL 531153 (9th Cir. Apr. 10, 2002), we reject Pineda-Torres's claim that 21 U.S.C. §§ 841 and 960 are facially unconstitutional.

owned the vehicle, Pineda-Torres told him a friend named Bob Armando Rodriguez. He then provided the inspector with the registration and correctly recited the registered owner's address.

Inspector Cruz testified at trial that Pineda-Torres appeared nervous, didn't make eye contact, was looking down, and had a scratch in his voice when answering questions. Inspector Cruz's notes from that day, however, do not mention anything about Pineda-Torres not making eye contact, looking down, or having a scratchy voice. The only description that was recorded in Inspector Cruz's notes was a notation that a "Mr. Beltran" appeared nervous. At trial, Inspector Cruz said that this must have been a typographical error because the notation was intended to refer to Pineda-Torres.

Inspector Cruz brought a drug-sniffing dog over to Pineda-Torres's car. After the dog alerted to the front dashboard of the car, Pineda-Torres was escorted to the secondary inspection area where Inspector Tibbetts examined the car. Tibbetts discovered twenty-three packages of marijuana weighing 42.7 pounds hidden from view in secret compartments behind the glove compartment.

Pineda-Torres was charged with importation of marijuana and possession of marijuana with intent to distribute in violation of 21 U.S.C. §§ 952, 960, and 841. Before trial, the government sent a letter to the defense stating its intention to introduce expert testimony about the structure of drug trafficking organizations including testimony that:

> (1) the drivers of load vehicles typically do not own the drugs they are transporting; (2) the driver of a load vehicle is typically not the person responsible for loading the drugs into the car, and, accordingly, fingerprinting is generally not a useful tool in the investigation of border busts; and (3) the driver of a load vehicle is typically not entrusted with transporting the vehicle to a load house, but usually only to a neutral site.

At the motion in limine hearing, the district judge ruled that he would allow the government's witness to testify about the structure of drug trafficking organizations including the futility of collecting fingerprints because of the compartmentalized nature of drug trafficking organizations. The district judge then told Pineda-Torres to "make [his] plan accordingly." In response to this directive, the defense cross-examined the government's witnesses about their failure to obtain fingerprints from Pineda-Torres's vehicle. One of these witnesses was Special Agent Robert Villars of the United States Customs Service. Special Agent Villars testified as an expert and explained, over defense objection, how drug trafficking organizations are structured. Specifically, Villars testified that, in a drug trafficking organization, all of the functions are compartmentalized with each member having a specific duty. There are those who grow the marijuana, those who store it, those who package it, those who find cars and drivers to smuggle it, and those who sell it. He also testified on direct that fingerprinting drug packaging would not be a valuable tool during drug courier investigations because drug trafficking organizations are

intentionally structured so that drivers do not load the drugs into the car.[2]

The defense presented no evidence. The only element at issue in the trial was whether Pineda-Torres knew that the drugs were in the car. During closing arguments, the government contended that, because Pineda-Torres was part of a "sophisticated drug organization," he must have known that drugs were in the car. The defense responded by arguing that the government did not present evidence sufficient to establish knowledge. Pineda-Torres was convicted on both counts. He was sentenced to 37 months in prison, 3 years supervised release, and a $200 special assessment. He appeals his convictions.

II. ANALYSIS

The case before us is, in almost all respects, similar to *United States* v. *Vallejo*, 237 F.3d 1008, 1012 (9th Cir. 2001), *amended by* 246 F.3d 1150 (9th Cir. 2001), in which we held that the admission of expert testimony about the structure of drug trafficking organizations violates Federal Rules of Evidence 401 and 403 "whe[n] the defendant is not charged with a conspiracy to import drugs or whe[n] such evidence is not otherwise probative of a matter properly before the court." *See also United States* v. *Varela-Rivera*, 279 F.3d 1174, 1179 (9th Cir. 2002) (holding that expert testimony concerning the structure of drug trafficking organizations

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[2] Additionally, Special Agent Villars testified that drug trafficking organizations intentionally use a packaging material that makes it difficult to lift clear fingerprints and that any recoverable prints would probably be from someone "south of the border" whose prints are not on file in the United States.

was irrelevant and prejudicial in a border courier case and therefore inadmissible under Federal Rules of Evidence 401 and 403); *United States* v. *McGowan*, 274 F.3d 1251, 1253-55 (9th Cir. 2001) (holding that expert testimony regarding the structure of drug trafficking organizations was inadmissible in a non-conspiracy importation case).

Vallejo, like Pineda-Torres, was driving a car from Mexico into the United States when he was stopped at the border where his car was searched and marijuana packages were found in hidden compartments. *Vallejo*, 237 F.3d at 1013; *see also Varela-Rivera*, 279 F.3d at 1176 (cocaine and methamphetamine found in the vehicle); *McGowan*, 274 F.3d at 1253 (marijuana found in the vehicle). Vallejo, like Pineda-Torres, was charged with importation of marijuana and possession with intent to distribute. *Vallejo*, 237 F.3d at 1012; *see also Varela-Rivera*, 279 F.3d at 1176 (charged with importation of cocaine and methamphetamine and possession with intent to distribute); *McGowan*, 274 F.3d at 1252 (charged with importation of marijuana and possession with intent to distribute). Neither Vallejo, nor Pineda-Torres, was charged with conspiracy and in neither case did the government introduce any evidence establishing a connection between the defendant and a drug trafficking organization. *Vallejo*, 237 F.3d at 1015; *see also Varela-Rivera*, 279 F.3d at 1179 (same); *McGowan*, 274 F.3d at 1254 (same). The only issue in both Vallejo's and Pineda-Torres's trials was whether the defendant knew that there were drugs in the car. *Vallejo*, 237 F.3d at 1017. At both trials, an expert testified about how drug trafficking organizations divide responsibilities among the people who grow, store, smuggle, and sell drugs. *Vallejo*, 237 F.3d at

1013-14; *see also Varela-Rivera*, 279 F.3d at 1176-77 (same); *McGowan*, 274 F.3d at 1253-54 (same).[3]

The implication of the expert testimony and the government's argument to the jury in both cases was plainly that the defendant was a member of an international drug organization and had knowledge that drugs were in the car. *Vallejo*, 237 F.3d at 1017. In Pineda-Torres's case, as in *Vallejo*, the state did not articulate a theory of relevance for the drug structure testimony at the trial. *Id.* at 1015. On appeal in this case, however, the government argued that the purpose of the expert testimony was to show that Pineda-Torres knew that drugs were in the car. We explicitly rejected that reason for offering drug structure evidence in *Vallejo* when we stated that "had that been the [government's] purpose, the district court should properly have excluded it under Rule 403 of the Federal Rules of Evidence." *Vallejo*, 237 F.3d at 1016. To the extent that the *Vallejo* statement may be dictum, we adopt it as a holding here.

In *Vallejo*, we compared the admission of expert testimony about the structure of drug trafficking organizations to the improper use of drug courier profiles and held that the district court abused its discretion when it admitted expert testimony about the structure and operation of drug trafficking organizations in a simple border bust case. *Id.* at 1017. Moreover, because the testimony "unfairly imputed specific knowledge to Vallejo and knowledge was the central question

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[3] Special Agent Robert Villars provided virtually identical expert testimony in both McGowan and Pineda-Torres's trials. *McGowan*, 274 F.3d at 1253. We held that admission of Special Agent Villars's testimony was reversible error in *McGowan*. *Id.*

before the jury," we concluded that the error was prejudicial and required reversal. *Id.* The same is true here.[4]

Our decision in *United States* v. *Murillo*, 255 F.3d 1169 (9th Cir. 2001), does not require a different result. *Murillo* did not involve expert testimony about the structure of drug trafficking organizations. Rather, *Murillo* involved "unknowing drug courier" modus operandi testimony—expert testimony that drug traffickers do not routinely entrust large quantities of drugs to people who are unaware that they are transporting them. *Id.* at 1176. In that case, we held that "unknowing drug courier" testimony was admissible in a drug possession case involving over one million dollars worth of methamphetamine and cocaine to attack the defendant's defense that he was "simply an unknowing courier." *See id.* at 1176-77; *see also United States* v. *Campos*, 217 F.3d 707, 712 (9th Cir. 2000) (holding that unknowing drug courier testimony was admissible in a complex drug importation case); *United States* v. *Cordoba*, 104 F.3d 225, 230 (9th Cir. 1997) (same).

We distinguished the expert testimony in *Murillo* from that in *Vallejo* by stating that unknowing drug

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[4] The fact that Pineda-Torres did not testify and affirmatively deny knowledge of the drugs that were found in the car is not dispositive. Both parties recognized in their closing arguments to the jury that the only issue in the case was knowledge. Because the improper expert testimony about the structure of drug trafficking organizations was admitted to support the government's contention of knowledge, the testimony was prejudicial regardless of whether Pineda-Torres affirmatively denied knowledge or argued that the government had not proven knowledge.

courier testimony, unlike testimony about the structure of drug trafficking organizations, does not require an expert to "extrapolate about the various roles individuals might play in hypothetical drug trafficking organizations" and does not "imply that [the defendant] participated in a large-scale operation." *Murillo*, 255 F.3d at 1177; *see also Vallejo*, 237 F.3d at 1016, *as amended by* 246 F.3d 1150 (declining to address the admissibility of unknowing drug courier testimony because "[t]his case does not involve the Government's use of 'unknowing courier' testimony"). Instead, an expert presenting "unknowing drug courier" testimony in a complex case looks at the specific facts involved and, in light of his investigative experience, offers his opinion that it would be illogical and contrary to general practice for a drug trafficker to take the very risky step of entrusting his valuable cargo to an unknowing courier.

By contrast, an expert providing testimony about the structure of drug trafficking organizations attributes knowledge to the defendant by attempting to connect him to an international drug conspiracy and thus implies that the defendant "participated in a large-scale operation." *Compare Murillo*, 255 F.3d at 1177. There is no direct evidence associating the defendant with a drug trafficking organization so the expert uses the "blueprint" structure of international drug trafficking organizations as a means of doing so. Because "[c]riminal prosecutions cannot be blueprinted, but must be tailored to the charges and facts of each case in consideration of the individual rights of each defendant," this method of imputing knowledge lacks any probative value and is impermissible. *Vallejo*, 237 F.3d at 1017.

We also reject the government's contention that in this case defense counsel "opened the door" to the drug structure testimony by cross-examining the customs agents about their failure to lift fingerprints from the drug packages and the vehicle.[5] We have held that limited drug structure testimony is admissible in drug importation cases when the defense opens the door by introducing evidence that the government did not attempt to lift fingerprints. *See, e.g., United States* v. *Alatorre*, 222 F.3d 1098, 1100 n.3 (9th Cir. 2000). In this case, however, it was not Pineda-Torres who first introduced the fingerprint evidence issue. Rather, the government notified the defense that it intended to have Special Agent Villars testify that fingerprinting would not be helpful in drug importation cases because of the compartmentalized structure of drug trafficking organizations. When, at an in limine hearing, Pineda-Torres objected to the proposed testimony because it impermissibly implied that he was connected to a drug trafficking organization, the district judge ruled that the government's evidence would be admitted and instructed Pineda-Torres to "plan accordingly." It was in accordance with this instruction that the defense subsequently questioned the government customs agents on cross examination about the lack of fingerprint evidence. Indeed, Pineda-Torres did precisely what the district judge told him to do and made his trial plans knowing that the government would adduce expert testimony as to the futility of obtaining fingerprint evidence in light of the structure and method of opera-

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[5] That is what occurred in *Murillo*, a case in which the defense engaged a fingerprint expert and initiated the inquiry at trial regarding the lack of fingerprints on the drug packages. *Murillo*, 255 F.3d at 1177.

tions of drug trafficking organizations. Under these circumstances, we cannot conclude that it was the defendant who "opened the door."

Because knowledge was the only element at issue in Pineda-Torres's case and because the admission of expert testimony about the structure of drug trafficking organizations "portrayed [Pineda-Torres] as a member of an enormous international drug trafficking organization and implied that he knew of the drugs in his car because of his role in that organization," *Vallejo*, 237 F.3d at 1017, the error was prejudicial and requires reversal. If anything, the expert testimony in Pineda-Torres's case was even more prejudicial than the testimony in *Vallejo*. In the present case, there was no evidence that Pineda-Torres admitted knowledge that there were drugs in the car, whereas, in *Vallejo*, the customs agent testified that the defendant stated that his friend had refused to drive the vehicle because it had drugs in it. *Vallejo*, 237 F.3d at 1013. Here, aside from the presence of the marijuana in the car and the minimally probative testimony regarding Pineda-Torres's apparent nervousness offered by a border agent whose notes contain significant omissions and a name other than the defendant's, the improper expert testimony imputing knowledge to Pineda-Torres by virtue of his implied connection to an international drug trafficking organization was the only evidence presented to establish that Pineda-Torres knew that drugs were in the car.

III. CONCLUSION

Because we hold that the district court committed prejudicial error when it admitted expert testimony about the structure of drug trafficking organizations,

we reverse Pineda-Torres's convictions and remand his case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

No. 00CR2627-E

UNITED STATES OF AMERICA, PLAINTIFF

v.

VICENTE PINEDA-TORRES, DEFENDANT

MOTION IN LIMINE HEARING

TRANSCRIPT

Nov. 6, 2000

Before: WILLIAM B. ENRIGHT, District Judge

* * * * *

MR. WINTER: Your Honor, the third in limine I filed was to exclude expert testimony. I have received notice of expert testimony in this case. It was—

THE COURT: I have in mind. I have seen the government's trial brief, and I see their offer of proof is contained in the trial brief.

MR. WINTER: That is the notice that I received, your honor. I just like to voice an objection for the

record to 702, 401, and 403. Specific to the 401 and 403 objection would be that the jury would infer because that's the government's expert is speaking of drug cartels and organizations that the inference is that Mr. Pineda is working for a drug cartel or organization when I believe that there is no evidence of that.

THE COURT: Sir?

MR. SAHAM: Your Honor, two things. There was an additional much more detailed disclosure made to Mr. Winter via a letter, a two-page letter enclosing certain attachments which was sent out on October 26, 2000. Additionally, with respect to the Special Agent, the government would seek to have testimony in two areas.

First, the value of marijuana; and secondly, with respect to the drug organization, a down-scaled version of that with respect to the compartmentalization within the drug smuggling organization.

THE COURT: Your case supporting the latter is what?

MR. SAHAM: Your Honor, we did not file a brief, but I think the *Cordoba* case that allows testimony on that issue. I am sorry, Your Honor.

THE COURT: Unless there is something else, it would be my view based upon the offering of the government's trial brief that the evidence they seek to elicit would be appropriate. I think the case law supports it.

You should make your plan accordingly—that that would be limited to the matter set out in the trial brief that would be before the trier of fact.

MR. WINTER: Your Honor, could I have one point to that. The *Cordoba* case deals with a large conspiracy case. This case is a small marijuana case for this district. It is 19.4 kilograms of marijuana. I just like to point out that difference.

THE COURT: Your position is noted on the record.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

No. 00CR2627-E

UNITED STATES OF AMERICA, PLAINTIFF

v.

VICENTE PINEDA-TORRES, DEFENDANT

TRIAL TRANSCRIPT

Nov. 7, 2000

Before: WILLIAM B. ENRIGHT, District Judge, and a Jury

* * * * *

CROSS-EXAMINATION

[of Special Agent Steven Tibbetts]

BY MR. WILSON:

Q. You wore gloves when you took the marijuana out of the vehicle?

A. I believe so, yes.

Q. Are you in charge of checking fingerprints on the marijuana?

A. No.

Q. Do you know who is?

A. No, I don't. Normally the investigators are. I really don't know much about that.

Q. You brought some bulk marijuana in front of you right there. Do you know if that has been checked for fingerprints?

A. No, I don't.

Q. When you were in the secondary inspection area, when did the fingerprint person come in?

A. I don't know exactly what time it was or how long after we removed the marijuana.

Q. Did you see a fingerprint person?

A. No.

Q. Do you know if fingerprints were taken in this case?

A. I don't know.

Q. But that's something that's done?

A. I don't know, sir.

Q. You have seen it done?

A. No.

Q. Have you heard of it done?

A. No.

MR. WINTER: Thank you, Your Honor. No further questions.

* * * * *

DIRECT EXAMINATION

[of Special Agent Robert Villars]

* * * * *

MR. SAHAM: The United States offers Senior Special Agent Robert Villars as an expert in narcotics smuggling and the value of marijuana.

MR. WINTER: Your Honor, I'd like to continue my objection under rule 401, 403.

THE COURT: I'll note your objection; I overrule it. You may cross-examine in this area.

You may proceed. Go ahead.

BY MR. SAHAM:

Q. Agent Villars, in your investigations of reactive cases such as this one, have you found fingerprinting the drug packaging to be a valuable tool in your investigations?

A. No, sir.

Q. Why not?

A. Several reasons. First of all, the material that is used to package the drugs is not conducive to pull prints off of. It also depends how it's hidden. If it is within the gas tank, the gas would be—being a solvent —would take the oil from the fingerprints. It would destroy that.

And also the fingerprints—if you were indeed to find a set of recognizable prints, you would most likely not be able to identify the fingerprints because it's from somebody south of the border of which we have no records of in the United States.

Q. Based on your experience and investigations, is the driver of the vehicle generally the person responsible for loading the narcotics into the vehicle?

A. No, sir.

Q. Why not?

A. It is very come [*sic*] compartmentalized. It's sectioned off for several reasons, one being security. They don't want to give away who they are. Also it is very specialized in that everybody has a specific duty within the organization.

Q. Are those sophisticated enterprises?

A. Yes, sir, they are.

Q. You were talking about compartmentalization and different functions. Could you describe to the jury what those functions are?

A. Basically what it takes to get the product coming north from the person who plants the seed in the ground, grows it and harvest it to pack it into the big 18-wheelers other boars or airplanes that bring it up to the border.

MR. WINTER: Objection; 403.

THE COURT: I note your objection. I will overrule it. The answer may stand. You may inquire.

THE WITNESS: Then you have the people who warehouse it at the border who store it, again the people who break it down into smaller packages, people who shape the packages for the vehicle, the type of conveyance they are using, people who procure the vehicles, who hire the drivers, who rent the houses on this side of the border, the stash houses, to secure their product one [*sic*] they get here. Everybody has a specific task.

* * * * *

CROSS-EXAMINATION

[of Special Agent Robert Villars]

BY MR. WINTER:

Q. Agent Villars, are you working actively on this case?

A. No, sir.

Q. Have you had any contact with Mr. Saham or the case agent Ms. Ayers, in this case?

A. Yes, I have.

Q. That's to come to testify in an expert capacity?

A. Yes, sir.

Q. You didn't do any of the investigation on this case?

A. No, sir.

Q. You weren't involved in the seizure of Mr. Pineda at the port of entry?

A. I never met him.

Q. Now, you started talking about—you talked at one point about fingerprints and you stated it's hard to get fingerprints of a gas tank. That's because of the gas?

A. Yes, if the packages are concealed with gas, the gas being a solvent, it would be difficult to get fingerprints.

Q. Because the gas is wet and also—

A. It is a solvent. It takes away oil. That's what fingerprints are is oil.

Q. Would it have been fruitless to try to take fingerprints?

A. I don't know whether those was—in this case.

Q. You can take fingerprints off plastic, right?

A. Yes, but the type of plastic it is a cellophane and is all wrinkled. I am no fingerprint expert, however. It is difficult. We have done some submissions—

Q. You can take fingerprints off of—

THE COURT: Let him finish the answer.

THE WITNESS: The wrapping that's so wrinkled that you don't get a whole print.

BY MR. WINTER:

Q. Some cellophane you can take fingerprints off?

A. I don't know. I have never met a person—I don't know of anybody that's ever done that taken fingerprints off cellophane.

Q. That's cellophane?

A. Yes, it's packaged and taped and I don't even know how this was packaged.

Q. What about hard plastic? Could you get fingerprints off that?

A. Yes, you could?

Q. And glass?

A. Yes.

Q. And metal?

A. Yes.

* * * * *

REDIRECT EXAMINATION

[of Special Agent Robert Villars]

BY MR. SAHAM:

Q. Agent Villars, based upon your prior investigation and experience, is the driver typically the person to load the marijuana in the vehicle in a smuggling operation such as what we have here?

A. No.

Q. And why isn't the driver responsible?

A. We have security. They don't want the driver to know anybody with the organization is hired to do one specific task. He is hired to do the task.

Q. You wouldn't expect to find the driver's prints anywhere—strike that.

You wouldn't expect the driver's print on the packaging?

A. No, sir, you wouldn't.

Q. Or necessarily in the interior area of the vehicle?

A. They might be in the interior of the vehicle.

Q. I think I asked that badly. I mean the interior where the marijuana is?

A. No. The driver is not allowed access to where they load the vehicles or to see the stash.

Q. Certainly, we would expect to find the driver's prints on the vehicle?

A. Yes, on doors of the vehicle.

Q. And gear shift?

A. Right.

Q. In your opinion would there be any sort of advantage to the investigation to lift the driver's prints from the steering wheel?

A. No, because we don't know who the driver is.

MR. SAHAM: I have no further questions.

THE COURT: Anything further of the witness?

MR. WINTER: Your Honor, yes.

RECROSS-EXAMINATION

[of Special Agent Robert Villars]

BY MR. WINTER:

Q. You stated that when you were talking about fingerprints that one of the reasons that fingerprints are sometimes not taken is because the individual is from south of the border?

A. The individual that packaged or loaded the vehicle is somebody south of the border. We never had any contact and no way to keep a record.

Q. Because we don't have records of those types of fingerprints?

A. We don't have records of foreign national's fingerprints.

Q. We do have records of people in the United States?

A. Yes, we have some if they have come in contact with law enforcement before. Yes, we have fingerprints somewhere.

Q. Or the DMV?

A. I believe you have a thumb print when you get your driver's license.

MR. WINTER: No further questions.

THE COURT: Anything further?

MR. SAHAM: Nothing further.

THE COURT: Thank you very much. You may be excused.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

No. 00CR2627-E

UNITED STATES OF AMERICA, PLAINTIFF

v.

VICENTE PINEDA-TORRES, DEFENDANT

TRANSCRIPT

Nov. 7, 2000

Before: WILLIAM B. ENRIGHT, District Judge, and a Jury

* * * * *

DEFENDANT'S CLOSING ARGUMENT

[by Mr. Winter]

MR. WINTER: There is no evidence that any fingerprint inquiry was made. We heard from agent, the expert that testified, Agent Villars, where fingerprints can't be taken from. They can't be taken from the gas tank. That just makes plain sense.

We know they can be taken from the dash. We know that they can be taken from the metal inside the compartment, and we know that they could possibly be taken from the drug bags. We know that the finger-

prints could have led to put the marijuana in this case, and that's another thing that the government has not done to prove this case beyond a reasonable doubt.

* * * * *

APPENDIX C

STATUTES AND RULES PROVISIONS

1. Section 841(a) of Title 21, U.S.C., provides:

§ 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

2. Section 952(a) of Title 21, U.S.C., provides:

§ 952. Importation of controlled substances

(a) Controlled substances in schedule I or II and narcotic drugs in schedule III, IV, or V; exceptions

It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that—

(1) such amounts of crude opium, poppy straw, concentrate of poppy straw, and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States—

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate,

(B) In any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 823 of this title, or

(C) in any case in which the Attorney General finds that such controlled substance is in limited quantities exclusively for scientific, analytical, or research uses,

may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.

3. Section 960(a) of Title 21, U.S.C., provides:

§ 960. Prohibited acts A

(a) Unlawful acts

Any person who—

(1) contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance,

(2) contrary to section 955 of this title, knowingly or intentionally brings or possesses on board a vessel, aircraft, or vehicle a controlled substance, or

(3) contrary to section 959 of this title, manufactures, possesses with intent to distribute, or distributes a controlled substance,

shall be punished as provided in subsection (b) of this section.

4. Rule 401 of the Federal Rules of Evidence provides:

Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

5. Rule 402 of the Federal Rule of Evidence provides:

> **Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible**
>
> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

6. Rule 403 of the Federal Rule of Evidence provides:

> **Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time**
>
> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

7. Rule 702 of the Federal Rules of Evidence provides:

> **Testimony by Experts**
>
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1)

the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

RESPONSE REQUESTED

No. 02-112

Supreme Court, U.S.
FILED
OCT 15 2002
CLERK

UNITED STATES OF AMERICA,

Petitioner,

- vs -

VICENTE PINEDA-TORRES,

Respondent.

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Pursuant to Title 18 United States Code §3006A(d)(6) and Rule 39 of this Court, Respondent, Vicente Pineda-Torres, asks leave to file the attached Brief in Opposition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of fees or costs and to proceed *in forma pauperis*.

Petitioner was represented by counsel appointed pursuant to Title 18 United States Code §3006A in the district court and on appeal to the Ninth Circuit Court of Appeals.

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Respectfully submitted,

Dated: October 15, 2002

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36 pp

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

No. 02-112

UNITED STATES OF AMERICA,

Petitioner,

- vs -

VICENTE PINEDA-TORRES,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether expert testimony concerning the structure and modus operandi of drug trafficking organizations is properly excluded under Fed. R. Evid. 401 and 403 in a prosecution of an alleged drug courier for importation of narcotics when there is no evidence connecting the defendant to a drug trafficking organization and there is no evidence that a drug trafficking organization was involved in the offense.

IN THE SUPREME COURT OF THE UNITED STATES

No. 02-112

UNITED STATES OF AMERICA,

Petitioner,

- v -

VICENTE PINEDA-TORRES,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO
UNITED STATES' PETITION FOR WRIT OF *CERTIORARI*

Respondent Vicente Pineda-Torres respectfully requests that the Court deny the Solicitor General's petition for a writ of *certiorari* filed on behalf of the United States.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *United States v. Pineda-Torres*, 287 F.3d 860 (9th Cir. 2002).

JURISDICTION

On April 23, 2002, the Ninth Circuit entered its judgment. 287 F.3d 860. The government has invoked the Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

21 U.S.C. §§ 841(a), 952(a), and 960(a) are set forth at *Petitioner's Appendix* ("*Pet. App.*") at 28a-30a.

Fed. R. Evid. 401, 403 and 702 are set forth at *Pet. App.* at 30a-32a.

STATEMENT OF THE CASE

A. Facts

On August 2, 2000, Mr. Vicente Pineda-Torres, the respondent, came to the San Ysidro Port of Entry driving a 1991 Mercury Cougar. He had been in Mexico visiting a friend in Tijuana. He was arrested after 19.40 kilograms of marijuana were discovered concealed in the dashboard area of the car.

At the port of entry, an Immigration and Naturalization Service ("INS") Inspector Carlito Cruz asked Mr. Pineda certain inspection questions. Mr. Pineda indicated that he was a permanent resident, he presented his INS documents, and he stated that the car belonged to a friend. The Inspector then asked to see the registration which provided that the registered owner was an individual named Bob Armando Rodriguez.

After receiving the registration, Inspector Cruz asked Mr. Pineda who owned the car, and for the registered owner's address. Mr. Pineda said that Bob Armando Rodriguez owned the car and lived at the address listed on the registration. Mr. Pineda said that he lived near Los Angeles, but that he had been visiting a friend in Tijuana. After a canine alerted to the car, Mr. Pineda was escorted to secondary inspection.

At trial, the INS Inspector testified that, in his opinion, Mr. Pineda appeared "nervous," did not make eye contact, "look[ed] down," and had a "scratch" in his voice. However, cross-examination revealed that the Inspector had noted in his report that a "Mr. Beltran" not Mr. Pineda-Torres, was nervous on August 2, 2000, the day of the arrest in this case. The inspector denied using a form or a "boilerplate" report to produce this one. Instead, he claimed that the insertion of a completely different name was just a "typo." Inspector Cruz admitted that his report, written on

August 2, 2000, did not contain any information indicating that Mr. Pineda-Torres was "avoiding eye contact," or that there was any scratch in his voice when he spoke.

A detailed inspection of the car revealed marijuana hidden in a secret compartment in the dashboard area in an amount of 42.7 pounds. One could not see the marijuana if the glove box was opened; it was neither visible through the vents in the car, nor could it be detected by a human's sense of smell.

B. The Expert Testimony

1. The Pretrial Expert Notice

Prior to trial, the government informed defense counsel that it would introduce testimony regarding the structure of drug smuggling organizations. By way of letter, the prosecutor noted that the expert witness "will testify that: (1) the drivers of load vehicles typically do not own the drugs they are transporting; (2) the driver of a load vehicle is typically not the person responsible for loading the drugs into the car, and accordingly, fingerprinting is generally not a useful tool in the investigation of border busts; and (3) the driver of a load vehicle is typically not entrusted with transporting the vehicle to a load house, but usually only to a neutral site." *Respondent's Appendix* ("*Resp. App.*") at 1a.

2. The *In Limine* Hearing

Mr. Pineda-Torres moved to preclude admission of "drug structure and organization testimony" pursuant to Federal Rules of Evidence 702, 401 and 403. *Pet. App.* at 13a-14a. Without stating why this testimony was relevant, the government claimed that the evidence of "compartmentalization within the drug smuggling organization" was admissible under "the *Cordoba*[1]

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[1] *United States v. Cordoba*, 104 F.3d 225, 230 (9th Cir. 1997)

case." *Pet. App.* at 14a. The district court stated that it would rely upon the "government's trial brief,"[2] to find that "the evidence they seek to elicit would be appropriate." *Pet. App.* at 14a. The district court instructed defense counsel to "make your plan accordingly." *Pet. App.* at 14a. Defense counsel argued that under the specific facts of Mr. Pineda-Torres' case, the expert testimony should not be admitted, *Pet. App.* at 15a (defense counsel pointed out, "the *Cordoba* case deals with a large conspiracy case and [Mr. Pineda-Torres'] was a small marijuana case . . . [involving] 19.4 kilograms of marijuana"), but the trial judge simply ruled that this expert testimony was admissible. *Pet. App.* at 14a-15a.

3. Mr. Pineda-Torres "planned accordingly."

In accordance with the trial judge's directive, defense counsel cross-examined a government witness regarding whether or not any fingerprint evidence was taken in this case. The government witness did not know whether fingerprinting had occurred. *Pet. App.* at 17a. The entire exchange consumed less than one page of the trial transcript. *See id.*

4. The expert testimony offered at trial

At trial, the government introduced the testimony of Senior Special Agent Robert Villars of the United States Customs Service. He was final witness for the prosecution and he was tendered to the jury as an expert on "narcotics smuggling" and the value of marijuana. *Pet. App.* at 18a. The prosecutor began the examination by discussing the fingerprint issue and having Senior Special Agent Villars indicate that fingerprinting the marijuana's packaging materials would be a fruitless endeavor:

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[2] The government conceded that it had not briefed the issue of the admissibility of this evidence. *Pet. App.* at 14a. It filed a trial memorandum which simply recited that it would introduce expert testimony "regarding the structure of drug smuggling organizations." *Resp. App.* at 3a-4a.

Q: Agent Villars, in your investigations of reactive cases such as this one, have you found fingerprinting the drug packaging to be a valuable tool in your investigations?

A: No sir.

Q: Why not?

A: Several reasons. First of all, the material that is used to package the drugs is not conducive to pull prints off of. It also depends on how it is hidden. If it is within the gas tank, the gas would be -- being -- a solvent -- would take the oil from the fingerprints. It would destroy that. Also the fingerprints -- if you were indeed to find a set of recognizable prints, you would most likely not be able to identify the fingerprints because it's from somebody south of the border of which we have no records in the United States.

Pet. App. at 18a-19a.

The prosecutor then elicited a description of the structure of generic drug trafficking organizations:

Q: Based on your experience and investigations, is the driver of the vehicle generally the person responsible for loading the narcotics into the vehicle.

A: No sir.

Q: Why not?

A: It is very come [sic] compartmentalized. It is sectioned off for several reasons, one being security. They don't want to give away where they are. Also it is very specialized in that everybody has a specific duty within the organization.

Q: Are these sophisticated enterprises?

A: Yes sir, they are.

Q: You were talking about compartmentalization and different functions. Could you describe to the jury what those functions are?

A: Basically what it takes to get the produce coming North from the person who plants the seed in the ground, grows it and harvests it to pack it into the big 18-wheelers other boats or airplanes that bring it up to the border.

* * * *

> Then you have the people who warehouse it at the border, who store it, again the people who break it down into smaller packages, people who shape the packages for the vehicle, the type of conveyance they are using, people who procure the vehicles, who hire the drivers, who rent the houses on this side of the border, the stash houses, to secure their produce one (sic) they get here. Everybody has a specific task.

Q: What's the purpose of the drug smuggling organization?

A: Like any other corporation, to make money.

Pet. App. at 18a-20a; *Resp. App.* at 9a.[3] No witness ever testified that any particular drug trafficking organization was involved in this case.[4]

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[3] Respondent included a page from the Reporter's Transcript where Agent Villars discusses the "purpose of the drug smuggling organization" which was omitted from the Solicitor General's Appendix.

[4] Although no reasons for admission of this testimony were proffered to the district court, on appeal, the prosecution stated that this testimony was offered to show: "[t]hat the driver is not just going off on a lark, but is delivering the vehicle loaded with drugs at a time and place specified and that the driver does not necessarily have large amounts of money.

* * * *

> [T]he limited expert testimony was relevant here, in order to clarify for the jury, the Government theory of the case: That Pineda did not have a proprietary interest in the marijuana, but was simply acting as a courier. . .. Simply put, this testimony explained that Pineda was not the wealthy proprietor of the marijuana, but was just a paid courier, who was delivering the marijuana for someone else to someone else.

Government's Response Brief on appeal at 5a-6a. The government also noted that here, the testimony was "specifically relevant" to "the timing of the smuggling venture, i.e., the fact that someone is waiting for the marijuana," and "to show that the driver is not a rich drug lord with a proprietary interest in the drugs but, just an everyday person being used to bring the drugs across." *Resp. App.* at 5a.. Finally, the prosecution contended that the expert "merely explained that Pineda's role as a knowing courier was a very limited one." *Resp. App.* at 6a (emphasis added).

At the trial level, there was never any testimony about whether or not the driver had a

Subsequent to Inspector Villars, the smuggling expert, no other evidence was presented at the trial, and the sole issue discussed in closing argument was whether or not Mr. Pineda-Torres knew about the marijuana hidden in the secret compartment of Mr. Bob Rodriguez's car. During summation, the prosecutor argued to the jury that "a sophisticated drug organization" was at work. *Resp. App.* at 7a-8a. The following day, the jury found Mr. Pineda-Torres guilty of both counts of the indictment. On January 29, 2001, he was sentenced to a term of 37 months incarceration, three years supervised release and a special assessment of $200.00. He appealed the convictions.

C. The Ninth Circuit's Opinion

The Ninth Circuit Court of Appeals reversed Mr. Pineda-Torres' convictions. *See Pineda-Torres*, 287 F.3d 860. It held that admission of Special Agent Villars' testimony, under the facts of Mr. Pineda-Torres' case, constituted "prejudicial error." *Id.* at 861. The decision focused upon the facts of Mr. Pineda-Torres' case, including the government's pre-trial expert notice which indicated that the prosecution would introduce not only the typical evidence regarding the structure of drug trafficking organizations but that they would affirmatively raise and address the lack of fingerprint evidence through the proposed smuggling expert. *Id.* at 862. The decision discussed the trial judge's *in limine* hearing where the testimony, including the fingerprint testimony, was deemed admissible, and where Mr. Pineda-Torres was told to "make [his] plan accordingly." *Id.* (brackets in original).

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proprietary interest in the marijuana, about the driver's lack of riches or the "timing of the smuggling venture." *See Pet. App.* at 18a-25a. Although in front of the court of appeals, the government conceded that its purpose was to "explain Pineda's role as a knowing courier," in this Court, the Solicitor General disavows such a motive, complimenting the district court in *United States v. McGowan*, 274 F.3d 1251 (9th Cir. 2001), petition for cert. pending No. 02-64 (filed July 12, 2002) ("*McGowan Pet.*") for being "meticulous in limiting Special Agent Villars's testimony about the compartmentalization of drug smuggling functions to avoid specific statements that the driver knew about the drugs." *See McGowan Pet.* at 14 n.5.

Mr. Pineda-Torres' cross-examination of the government witness regarding fingerprints was "[i]n response to this directive." *Id.*

The decision also discussed in detail Agent Villars' trial testimony and the prosecutor's contention, in closing argument, that Mr. Pineda-Torres, as part of a "sophisticated drug organization, [] must have known that drugs were in the car." *Id.* at 863.

The appeals court indicated that the facts of Mr. Pineda-Torres' case, involving a single defendant, driving a car from Mexico into the United States, with marijuana concealed in a hidden compartment within the car, where the prosecution introduced no evidence of any "connection between the defendant and a drug trafficking organization" were "similar" to the facts in *United States v. Vallejo*, 237 F.3d 1008, 1012 (9th Cir. 2001), *amended*, 246 F.3d 1150 (9th Cir. 2001).[5] *Pineda-Torres*, 287 F.3d at 863-864.

Also, similar to *Vallejo* was that the prosecution in *Pineda-Torres* never articulated pre-trial why this expert testimony was relevant. *Pineda-Torres*, 287 F.3d at 863. The appeals court rejected the basis offered on appeal: that this evidence showed that Mr. Pineda-Torres knew that drugs were in the car, because "had that been the [government's] purpose, the district court should properly have excluded it under Rule 403 of the Federal Rules of Evidence." *Id.* at 864 (citing *Vallejo*, 237 F.3d at 1016). The *Pineda-Torres* court discussed *Vallejo*, noting that there, the admission of expert testimony about the structure of drug trafficking organizations in a "simple border bust case" absent evidence associating the defendant with a drug trafficking organization, impermissibly allowed the unsupported inference that the defendant was "a member of an enormous international drug

---

[5] The court of appeals also noted that the charges: importation and possession of marijuana with intent to distribute it, 21 U.S.C. §§§ 952, 960 & 841, were the same as those in the *Vallejo* case. *Id.* at 863-864.

trafficking organization and implied that he knew of the drugs in his car because of his role in that organization . . . ." *Id.* at 864-65 (citing *Vallejo*, 237 F.3d at 1017. It was the absence of any facts associating the defendant with any drug trafficking organization which led both the *Vallejo* and the *Pineda-Torres* courts to conclude that admission of expert testimony about the structure of drug trafficking organizations was similar to the "improper use of drug courier profiles." *Id.* at 864 (citing *Vallejo*, 237 F.3d at 1017). Citing *Vallejo*'s finding, that under its facts, which were virtually identical to Mr. Pineda-Torres', the smuggling expert's testimony "unfairly imputed specific knowledge to Vallejo [where] knowledge was the central question before the jury," the *Pineda-Torres* court ruled that admission of the evidence was prejudicial error, necessitating reversal. *Id.*

The *Pineda-Torres* court did not articulate a "bright-line" or "categorical" rule regarding admission of this type of expert testimony. In fact, after its extensive discussion of the facts of Mr. Pineda-Torres' case, it pointed out that other related types of expert testimony were not precluded in the Ninth Circuit and may have been admissible given the proper factual predicate. *See, e.g., id.* at 863 (discussing *United States v. Murillo*, 255 F.3d 1169 (9th Cir. 2001) (permitting "'unknowing drug courier'" and modus operandi testimony that "drug traffickers do not routinely entrust large quantities of drugs to people who are unaware that they are transporting them"); *United States v. Campos*, 217 F.3d 707, 712 (9th Cir. 2000) (upholding unknowing courier testimony in a "complex drug importation case"); *United States v. Cordoba*, 104 F.3d 225, 230 (9th Cir. 1997) (same) and *United States v. Alatorre*, 222 F.3d 1098, 1100 n.3 (9th Cir. 2000) (allowing drug trafficking organization and structure testimony where defendant opens the door by arguing lack of fingerprints)). While recognizing that when the proper foundation exists, this type of "structure" evidence could be admissible, the *Pineda-Torres* decision held that absent such foundation, *i.e.*, evidence associating the defendant with an actual drug trafficking organization, allowing "'an expert

to extrapolate about the various roles individuals might play in hypothetical drug trafficking organizations,'" was overly prejudicial. *Id.* at 865 (quoting *Murillo*, 255 F.3d at 117).

The *Pineda-Torres* court specifically discussed both the *Murillo* and *Alatorre* cases, finding that unlike *Murillo* and *Alatorre*, Mr. Pineda-Torres had not "opened the door" to this type of testimony because "it was not [he] who first introduced the fingerprint evidence issue. Rather, the government notified the defense that it intended to have Special Agent Villars testify that fingerprinting would not be helpful in drug importation cases because of the compartmentalized structure of trafficking organizations," *Pineda-Torres*, 287 F.3d. at 865-66, and the district court told Mr. Pineda-Torres to "plan accordingly." *Id.* at 866.

REASONS FOR DENYING THE PETITION

The Solicitor General believes that the question pending before this Court in *United States v. McGowan*, 274 F.3d 1251 (9th Cir. 2001), petition for cert. pending No. 02-64 (filed July 12, 2002) ("*McGowan Pet*") at 5, is identical to the question presented in this case, thus, it urges the Court to hold this writ of certiorari pending the disposition of the *McGowan certiorari* petition, No. 02-64. *Pet.* at 5. The Solicitor General believes that Mr. Pineda-Torres' case "presents the question whether expert testimony concerning the structure and modus operandi of drug trafficking organizations is categorically prohibited by the Federal Rules of Evidence in the prosecution of a drug courier for importation of narcotics." *Pet.* at 4. The Solicitor General believes that "the Ninth Circuit cases reveal that it has created a *per se* bar to this form of expert testimony in a significant category of cases." *McGowan Pet.* at 7.

First, the court of appeals' decision in *Pineda-Torres* is not appropriate for a grant of *certiorari* because it does not present a conflict with any other court of appeals' decision regarding an important issue. Second, the *Pineda-Torres* decision in no way presents the question of whether

a certain type of expert testimony is "categorically prohibited" nor does it exemplify any sort of *per se* bar to admission of expert testimony regarding the structure of drug trafficking organizations in certain broad categories of cases. As is demonstrated below, the *Pineda-Torres* decision is heavily dependent upon its particular facts and nowhere articulates any type of *per* se rule or categorical prohibition. Thus, even if the Solicitor General is correct that *McGowan* sets forth a *per se* rule, it is clear that the fact-intensive approach applied in the instant case does not. Finally, the Ninth Circuit has not created a *per se* rule precluding certain expert testimony in *Pineda-Torres* or any other case. The respondent also believes that neither the *McGowan* nor the *Vallejo* decisions of the Ninth Circuit exemplify any categorical prohibition or *per se* rule excluding a particular type of expert testimony in some broad category of cases and that discussion has been fully set forth in the Brief for Respondent, Daniel McGowan, in Opposition To The United States' Petition For Writ of *Certiorari* To The United States Court of Appeals For The Ninth Circuit, No. 02-64, filed on September 9, 2002 ("*McGowan Opposition*") at pp. 11-34. Mr. Pineda-Torres incorporates by reference all arguments made in that response.

A. The Decision In Pineda-Torres Does Not Present A Conflict With Other Appeals Court Decisions Nor Does It Present A Question Of Such Significance That This Court Should Grant The Solicitor General's Petition

According to this Court's Rules, a petition for writ of *certiorari* should only be granted for "compelling reasons." Sup. Ct. R.10. Such compelling reasons include a conflict with another court of appeals' decision or where the appeals court has "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory powers." *Id.* Neither reason exists here.

The decisions in *Vallejo*, *McGowan* or *Pineda-Torres* do not conflict with the decisions of any other circuit. No other circuit to date has even cited these authorities. In fact, the Second Circuit has reached a similar result in a case involving testimony about organized crime in which the defendants were unconnected to the organization. *See United States v. Long*, 917 F.2d 691, 701-03 (2d Cir. 1990).

The Solicitor General's argument that *Vallejo* creates some conflict between the circuits essentially boils down to the position that any case which approves some sort of expert testimony on *modus operandi* or any other issue related to drug trafficking, conflicts with *Vallejo*, *McGowan* and *Pineda-Torres*. *See McGowan Pet.* at 16-19. The authorities he cites, *id.*, do not support his position. It is not the case that any decision which approves some sort of expert testimony about *modus operandi* related to drug trafficking, conflicts with the decisions in *Vallejo*, *McGowan* and the instant case. None of the cases where courts permit this *modus operandi* type testimony present fact patterns analogous to respondent's case. *See id.* Moreover, the premise -- that *Vallejo*, *McGowan* and respondent's case create a *per se* rule that is inconsistent with drug *modus operandi* cases -- is flawed: the Ninth Circuit itself has confirmed that such evidence remains admissible post-*Vallejo* and that *Vallejo* established no such *per se* rule. *See, e.g., United States v. Valencia-Amezcua*, 278 F.3d 901, 909 (9th Cir. 2002) ("*Vallejo* expressly approved admissibility of *modus operandi* testimony").

In addition, this *modus operandi* evidence is not always admitted as substantive evidence of guilt when it runs afoul of cases precluding drug courier profile testimony. *See United States v. Beltran-Rios*, 878 F.2d 1208,1210 (9th Cir. 1989) (criticizing the use of expert testimony of drug profiles as substantive evidence). In *United States v. Brito*, 136 F.3d 397 (5th Cir. 1998), the government offered evidence of "a profile of family drug organizations," and then compared the

defendants -- several family members -- to the profile. The Fifth Circuit flatly rejected such testimony: "[t]his type of profile evidence is inadmissible to prove substantive guilt based on similarities between defendants and a profile." *Id.* at 412 (citing *United States v. Williams*, 957 F.2d 1238 (5th Cir. 1992)).

Other Circuits employ similar reasoning. *See, e.g., United States v. Small*, 74 F.3d 1276, 1283 (D.C. Cir. 1996) ("drug-courier profile evidence was relevant only to the officers' probable cause and not to Small's guilt") (citations omitted); *United States v. Jones*, 913 F.2d 174, 177 (4th Cir. 1990) ("the trial court abused its discretion [by] admit[ting] expert testimony of drug profiles as substantive evidence"); *United States v. Quigley*, 890 F.2d 1019 (8th Cir. 1989) (same); *accord* Mark J. Kadish, *The Drug Courier Profile: In Planes, Trains, And Automobiles; and Now in the Jury Box*, 46 Am. U. L. Rev. 747 (1997) (severely criticizing the use of "drug courier profile" testimony). The various *modus operandi* cases thus lead to two conclusions. First, they are factually distinct from *Vallejo*, *McGowan* and *Pineda-Torres*; none of them involve even remotely similar fact patterns. Second, while it appears that there may be some tension between the cases permitting this *modus operandi* type testimony cited by the Solicitor General and the cases such as *Brito*, 136 F.3d 397, and the cases which suggest such evidence constitutes inadmissible "drug-courier profile" testimony, that issue is not presented in either this petition or the *McGowan* petition currently pending before this Court.[6] There is no conflict between *Vallejo, McGowan* and *Pineda-Torres* and

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[6] The Solicitor General mistakenly believes that counsel for respondent McGowan conceded that there was some "tension" between *Vallejo* and the cases discussed in the *McGowan* petition. *See* Reply Brief For The United States in *United States v. McGowan*, No. 02-64. Not so. Respondents McGowan and Pineda-Torres steadfastly maintain that there is no conflict between the decision in *Vallejo* and any other circuit court case. To the extent that conflict exists between those cases which find impermissible "drug courier profile" type testimony and those which do not, that is not the issue presented in *Vallejo*, *McGowan* or *Pineda-Torres*.

any other case which addresses the issue resolved there – whether or not an expert may opine about the structure of drug smuggling organizations consistent with Federal Rule of Evidence 403 in a case where there is no evidence of the workings of a drug smuggling organization.

In its Response to the pending *certiorari* petition filed in *McGowan*, No. 02-64, respondent sets forth a comprehensive discussion of the cases which permit this *modus operandi* testimony and how that testimony is actually linked on an evidentiary basis to the facts of those cases – something which was absent in *Vallejo*, *McGowan* and *Pineda-Torres* and respondent relies upon that discussion. *See McGowan Opposition* at pp. 30-32.

B. The *Pineda-Torres* Case Neither Creates Nor Applies Any Blanket Prohibition Upon Expert Testimony About The Structure Of Drug Smuggling Organizations.

The Solicitor General contends that the *Pineda-Torres* decision presents an example of a categorical prohibition applied to a certain type of expert testimony which exists in the Ninth Circuit. The discussion of the *Pineda-Torres* decision set forth above, *supra* at pp. 7-9, as well as below, should dispel that notion. *Pineda-Torres* depended entirely upon its facts, which the decision discusses at great length, and it never once referred to the Ninth Circuit's earlier decision in *Vallejo* as establishing a "rule"[7] or as the Solicitor General believes, some sort of categorical prohibition. *See Pet.* at (I). In support for its argument that respondent's case should travel with the *McGowan certiorari* petition, the Solicitor General also contends that *Pineda-Torres* relies upon the *McGowan* case. *See Pet.* at 4-5. *Pineda-Torres* does not depend upon the *McGowan* decision.[8] It does rely

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[7] *McGowan* referred to the *Vallejo* decision as establishing a "general rule." 274 F.3d at 1254. The *Pineda-Torres* decision nowhere uses that terminology.

[8] *Pineda-Torres* cited *McGowan* with the "*see also*" signal in front of it, indicating that it was merely supplemental authority. Similarly, it noted, as an aside, in a footnote that the testifying expert in the *McGowan* case was the same individual who provided the expert

upon earlier precedent in *Vallejo*, 237 F.3d 1008, *amended*, 246 F.3d 1150, however, that decision does not create any sort of categorical prohibition to the admission of a certain type of expert testimony. *See generally id.*[9]

First, the *Pineda-Torres* court never refers to any sort of "rule" regarding the admission of expert testimony about the structure of drug trafficking organizations. *See generally Pineda-Torres*, 287 F.3d 860. Neither does it refer to the *Vallejo* case as establishing a categorical rule – *Vallejo* simply provides a framework for application of Federal Rules of Evidence 401 and 403. *Id.* at 862-863. While it discussed the factual similarities of Mr. Pineda-Torres' case with the facts of *Vallejo*, the most important similar fact was the government's failure to provide proper foundation for admission of this expert testimony. There was no evidentiary link between a drug smuggling organization and the facts of both Mr. Vallejo and Mr. Pineda-Torres' cases. *See Pineda-Torres*, 287 F.3d at 863 ("Neither Vallejo, nor Pineda-Torres, was charged with conspiracy and in neither case did the government introduce any evidence establishing a connection between the defendant and a drug trafficking organization.") (citing *Vallejo*, 237 F.3d at 1015) (other citations omitted).[10] In

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testimony at issue there. *Pineda-Torres* 287 F.3d at 863 n.3.

[9] The Solicitor General in its petition in *McGowan*, No. 02-64, incorrectly asserts that "the Ninth Circuit's rule categorically excludes a traditional form of relevant and admissible evidence, and thus needlessly complicates the prosecution of a common type of drug offense in the Nation's border districts." *McGowan Pet.* at 8. This is not the case. No such categorical rule has been created; the only evidence which is excluded is that without demonstrated relevance under the facts of each case. If anything, the omission of this testimony absent any proper foundation will lead to far less complication in an otherwise simple case. This result is what this Court's precedents and the Federal Rules of Evidence, 401-403 as well as 702 require.

[10] In *Pineda-Torres*, *McGowan* and *Vallejo*, the prosecution simply introduced this type of narcotics smuggling expert testimony without providing evidence that any drug smuggling organization was involved in the case. The Solicitor General may suggest that such evidence would be difficult to obtain; however, as government counsel conceded in *Vallejo*, the prosecution in the Southern District of California was "routinely introduc[ing] the structure of

Pineda-Torres, the court of appeals, while recognizing that *Vallejo* is substantially similar, conducted an analysis of the expert testimony under Federal Rules of Evidence 401 and 403 and found itself in accord with the *Vallejo* analysis. *See id.* at 862-863. In fact, the *Pineda-Torres* court determined that, apart from the *Vallejo* decision, application of the evidentiary rules to the facts of Mr. Pineda-Torres' case, revealed that here, the expert testimony was "even more prejudicial than the testimony in *Vallejo*." *Id.* at 866.

Indeed, if *Pineda-Torres* was simply an invocation of a pre-existing rule set forth in the *Vallejo* case, the court of appeals would have had no need to provide any analysis whatsoever – a citation to *Vallejo* would have sufficed.[11] Instead, the appeals court set forth a lengthy discussion of the facts of Mr. Pineda-Torres' case, the pre-trial proceedings, including the expert notice, the *in limine* hearing, the expert testimony introduced at the trial, and the disputed trial issues. *See Pineda-Torres*, 287 F.3d at 861-862. The decision then applied each of the facts discussed to the appropriate framework for analyzing whether admission of evidence was error under the Federal Rules of Evidence 401 and 403.

Contrary to the Solicitor General's contention, neither *Vallejo*, *McGowan* nor the instant case hold that expert testimony about the structure of drug trafficking organizations, is *per se* irrelevant and overly prejudicial in all prosecutions involving narcotics couriers. *See Pet.* at 4-5. Instead, the Court of Appeals has ruled that admission of this "structure" testimony was error for a simple reason:

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drug trafficking organizations in every drug importation prosecution to make up for the lack of fingerprints on the drugs in question." *Vallejo*, 237 F.3d at 1015. Thus, it is the government who encouraged application of the *per se* rule of admission of this expert testimony in every drug importation case regardless of the underlying facts or any asserted defenses.

[11] There would have been no need to issue a published decision in the *Pineda-Torres* case if the *Vallejo* decision already set forth this categorical rule.

the government has failed in each of these cases to "introduce any evidence establishing a connection between [the defendant] and a drug trafficking organization." *Vallejo*, 237 F.3d at 1015; *McGowan*, 274 F.3d at 1254; *Pineda-Torres*, 287 F.3d at 864. Because of the lack of foundation, the evidence is irrelevant and, if probative at all, unduly prejudicial because it unfairly "portray[s the defendant] as a member of an enormous international trafficking organization and implie[s] that he knew of the drugs in his car because of his role in that organization." *See Vallejo*, 237 F.3d at 1017. But nothing in *Vallejo*, *McGowan* or respondent's case suggests that, if a proper foundation is offered establishing a connection between the defendant and an organization, such expert testimony would not be admissible. In *Pineda-Torres*, as in *Vallejo* and *McGowan*, the Court of Appeals' decisions reach the common sense conclusion that where the government fails to offer *any* evidence linking the defendant to a Mexican drug smuggling organization, the admission of highly prejudicial testimony regarding such organizations is not justified under Fed. R. Evid. 401 and 403. This is not a revolutionary concept, limited to the Ninth Circuit. *See, e.g., United States v. Castillo*, 924 F.2d 1227, 1234 (2d Cir. 1991) ("we take serious issue with the Government's use of an expert witness to propound the impermissible theory that appellants' guilt could be inferred from the behavior of unrelated persons"); *accord United States v. Cruz*, 981 F.2d 659, 663 (2d Cir. 1992) (same); *Long*, 917 F.2d at 701-03 (admission of expert testimony on organized crime figures who were not connected to the defendants "had the effect of implicating [the defendants] as part of a much larger criminal organization and associating them with all the sinister aspects and activities of that criminal organization").

Moreoever, the Solicitor General's claim that the Court of Appeals has established a *per se* bar to expert testimony of the sort offered in respondent's case is belied by the numerous post-*Vallejo* cases in which the Ninth Circuit has approved expert *modus operandi* testimony in drug cases, many

of which were cited in the *Pineda-Torres* decision itself, *see Valencia-Amezcua*, 278 F.3d at 909 ("*Vallejo* expressly approved admissibility of *modus operandi* testimony"); *Murillo*, 255 F.3d 1169 (permitting "'unknowing drug courier'" and modus operandi testimony); *Alatorre*, 222 F.3d at 1100 n.3 (allowing drug trafficking organization and structure testimony where defendant opens the door by arguing lack of fingerprints) as well as the cases factually similar to *Pineda-Torres*, *McGowan* and *Vallejo*, where the Ninth Circuit approved "structure" testimony when the evidence elicited at the trial provided sufficient foundation. *See, e.g., United States v. Lopez*, No. 01-50683 (9th Cir. August 14, 2002) (expert testimony about drug trafficking organizations admissible where defendants introduced evidence about lack of fingerprint evidence); *United States v. Moreno-Fuentes*, No. 01-50207 (9th Cir. April 24, 2002) (same); *United States v. Hernandez-Silva*, No. 0010641 (9th Cir. March 12, 2002) (expert testimony about illicit drug trafficking business admissible in drug courier case where conspiracy was charged). As is indicated in both *Pineda-Torres*, 287 F.3d at 863, prior decisions admitting this expert *modus operandi* testimony were untouched by *Vallejo*. *See Campos*, 217 F.3d at 712 (upholding unknowing courier testimony in a "complex drug importation case");*Cordoba*, 104 F.3d at 230 (same); *see also Vallejo*, 237 F.3d at 1015-1016 (listing cases, with approval, where courts "allowed 'government agents or similar person [to] testify as to the general practices of criminal to establish the defendants' modus operandi'").

In its response to the Solicitor General's petition for *certiorari* in *McGowan*, No. 02-64, counsel for respondent McGowan sets forth other persuasive reasons why neither *McGowan* nor *Vallejo* imposes any *per se* rule requiring exclusion of the government's proposed expert testimony and discusses why the *McGowan* case does not satisfy this Court's criteria for a grant of *certiorari*. *See McGowan Opposition* at pp.11-34. The respondent incorporates by reference those arguments and adopts them as his own.

B. The *Pineda-Torres* Case Is Distinct From *McGowan*, It Did Not Depend Upon *McGowan*, And It Should Not Be Held Pending Disposition in *McGowan*

Even if this Court were to consider *McGowan* as the proper vehicle for a grant of *certiorari*, it should leave undisturbed the *Pineda-Torres* decision. As noted above, *Pineda-Torres* does not set forth any bright-line rule, it engages in its own evidentiary analysis, and it is heavily factually dependent, thus it fails to set forth any broad principles of application. As discussed above at pp. 7-9, the *Pineda-Torres* court ruled that expert testimony regarding the structure of drug trafficking organizations was inadmissible under the following circumstances: (1) where the prosecution failed to articulate, either before or during trial, any basis for the relevance and admission of this government expert's testimony, *Pineda-Torres*, 287 F.3d at 863; (2) where it failed to circumscribe the content of the testimony, *Pet. App.* at 13a-15a; (3) where the prosecution gave pretrial notice that it would raise the "lack of fingerprints" issue, *Pineda-Torres*, 287 F.3d at 862-863; (4) where no evidentiary foundation for the evidence had been laid, *id.*, and (5) where, on appeal, the government in *Pineda-Torres* urged that its expert witness be allowed to explain Mr. Pineda-Torres' role as a "knowing courier." *Resp. App.* at 6a. These facts should all be contrasted with the decision in *McGowan* where detailed reasons were offered pre-trial in support of the testimony, where the trial judge "meticulously limited" the testimony, and stated that the expert could not opine that the couriers were "knowing," where the government did not contend that it planned to raise the fingerprint issue pre-trial, and where no explicit concession is made that under certain circumstances, this evidence would be relevant.[12] *Pineda-Torres* is distinct factually from *McGowan* and its

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[12] In distinguishing the *Murillo* case, *McGowan* notes that *Murillo* did not involve a challenge pursuant to Fed. R. Evid. 403, but, rather, simply involved Fed. R. Evid. 401. *McGowan* by no means provides that this "structure" testimony could never survive a Rule 403 challenge – however, *Pineda-Torres* explicitly states that it can and cites cases to that effect. *See Pineda-Torres*, 287 F.3d at 864-865.

determination depends so heavily upon its facts, that it should not be held pending resolution of the pending *certiorari* petition in *McGowan*.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

Dated: October 15, 2002

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October 26, 2000

VIA FACSIMILE [(619) 687-2666]
Matthew Winter, Esq.
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Re: United States v. Vincente Pineda-Torres

Dear Matt:

I am writing to provide you with notice of expert testimony, pursuant to Rule 16(a)(1)(E) of the Federal Rules of Evidence, which the government intends to introduce during trial of the above-entitled matter. Please provide all reciprocal notice and discovery contemplated by Rule 16(b) by October 31, 2000.

1. Narcotics Expert

The Government intends to introduce the testimony of a narcotics expert. The narcotics expert will be United States Customs Service Special Agent Robert Villars. The agent's specialized background and training in narcotics are set forth in the attached resume.

Agent Villars will testify to the wholesale and retail values of the 42.7 lbs of marijuana seized in this case, both in Tijuana and San Diego. His conservative estimates of those values will be as follows: $6,300.00 (wholesale in Tijuana); $13,650.00 (wholesale in San Diego), $33,600.00 (street value in San Diego, based on street price ranging from $50 per ounce, low end). Agent Villars will testify that $50 per ounce is toward the low end of the range for marijuana sold on the street in California. His testimony will explain that drivers have the critical responsibility of passing by law enforcement officials who are trained to detect persons transporting such loads. This risk factor accounts for the increase in the wholesale value.

Agent Villars will state his opinion that the amount seized was for distribution rather than personal use. This opinion will be based on the value and amount of marijuana, and the manner in which the marijuana was packaged.

The witness will also testify regarding certain modus operandi of marijuana smuggling organizations operating across the international border between the United States and Mexico. The witness will base his opinions on his background and experience, review of pertinent literature, and conversations with informants, cooperating defendants and other sources. More specifically, Agent Villars will testify that: (1) the drivers of load vehicles typically do not own the drugs they are transporting; (2) the driver of a load vehicle is typically not the person responsible for loading the drugs into the car, and, accordingly, fingerprinting is generally not a useful tool in the investigation of border busts; and (3) the driver of a load vehicle is typically not entrusted with transporting the vehicle to a load house, but usually only to a neutral site.

Agent Villars will base his opinions on his experience investigating these types of cases. His opinion will be based on his hands-on experience interrogating smugglers, debriefing confidential informants and discussing intelligence information with other Customs agents. He has investigated numerous drug trafficking investigations along the U.S./Mexican border. A copy of his resume and value memorandum are enclosed for your information.

2. DEA Chemist

The Government also intends to introduce the testimony of DEA Chemist Fracia Martinez. Her resume and analysis are attached. The DEA chemist will testify that she performed various tests on the substance seized from your client, and that these tests all indicated marijuana. She will base this opinion on her background, education and experience, along with her knowledge and use of accepted scientific methods of testing.

Very truly yours,

GREGORY A. VEGA
United States Attorney

Scott H. Saham
Assistant United States Attorney

Attachments: Chemist's resume and Analysis
Customs Agents's resume and value information

II

STATEMENT OF THE FACTS

On August 2, 2000, Vicente Pineda-Torres ("Defendant") entered the United States from Mexico at the San Ysidro POE. Concealed within the 1991 Mercury Cougar he was driving was 42.7 lbs. of marijuana. Defendant told Immigration Inspector Cruz that the vehicle belonged to a friend. The defendant appeared nervous. Defendant also stated that he had visited a friend in Tijuana the previous night.

A canine detected a narcotics odor in the vehicle at the secondary inspection area. Subsequently, 23 packages of marijuana were found, in a specially built compartment in the dashboard of the vehicle. A layer of felt blocked the vents in the front dash. The Defendant was advised of his Miranda rights and invoked them. The Defendant has an extensive criminal history.

III

WITNESSES

The Government expects to call the following witnesses in its case-in-chief:

1. Steven Tibbetts
2. C. Cruz
3. Dino Polselli
4. Suzanne Harris
5. Expert Witness. The Government will call Customs Special Agent Robert Villars to testify as an expert witness regarding the wholesale value of marijuana (in Mexico and in the United States) and the street value of the marijuana seized from the Defendant. This agent will opine as to what constitutes a personal use amount of marijuana. This agent will further testify regarding the structure

of drug smuggling organizations. He will base his opinions upon his experience as a Customs agent.

6. Drug Enforcement Administration ("DEA") Forensic Chemist Fracia Martinez. Absent a stipulation, the Government will call Ms. Martinez as an expert witness in the field of forensic chemistry. Ms. Martinez will testify that the substance seized from the Defendant was marijuana, a Schedule I Controlled Substance. She will base her opinion on her experience as a DEA chemist.

IV

STIPULATIONS

To expedite the trial the government has requested a stipulation regarding the amount, chemical makeup and the chain of custody of the substance seized from the defendant's vehicle.

V

EXHIBITS

The Government will file an exhibit list at the time of trial. The Government requests that defense counsel examine the exhibits prior to trial in order to expedite the proceedings. The Government also requests time to examine the defense exhibits before trial.

VI

JURY INSTRUCTIONS

The Government will file proposed jury instructions separately.

VII

APPLICABLE LAW AND EVIDENTIARY ISSUES

A. 21 U.S.C. §§ 952 AND 960, IMPORTATION OF A CONTROLLED SUBSTANCE

The United States must prove beyond a reasonable doubt that:

1. Defendant intentionally brought marijuana into the United States;

testimony was specifically relevant to the following issues: (1) the timing of the smuggling venture, ie. the fact that someone is waiting for the marijuana; and (2) to show that the driver is not a rich drug lord with a proprietary interest in the drugs but, just an everyday person being used to bring the drugs across. This testimony provides the context which allows a jury to understand how drug couriers work. That the driver is not just going off on a lark, but is delivering the vehicle loaded with drugs at a time and place specified and that the driver does not necessarily have large amounts of money.

Accordingly, the limited expert testimony was relevant here, in order to clarify for the jury, the Government theory of the case: That Pineda did not have a proprietary interest in the marijuana, but was simply acting as a courier. The expert testimony was not offered in order to impute knowledge to Pineda regarding the other functions necessary to grow marijuana, package it, transport it to the border, and ultimately to distribute it in the United States. The testimony was simply offered to show the jury that Pineda was only performing one role in this process. Simply put, the testimony explained that Pineda was not the wealthy proprietor of the marijuana, but was just a paid courier, who was delivering the marijuana for someone else to someone else. This fact, is contrary to the popular notion of a drug smuggler. Moreover, this testimony is undisputably relevant to Count 2 of the Indictment, possession with the intent to distribute, as the Government was required to prove that Pineda intended to deliver

the marijuana to someone else. The testimony explained that Pineda was not crossing the border on a lark, but was crossing the border knowingly and intentionally with the purpose of delivering the marijuana to another individual at a preset time and location. The testimony was relevant to Pineda's knowledge, motive, and intent. The testimony in no way imputed knowledge of other individuals involved in the marijuana smuggling business to Pineda, nor did it create an inference that he had an ownership interest in the marijuana. The expert merely explained that Pineda's role as knowing courier was a very limited one.

Additionally, the testimony at issue is probative to explain or counter the defense argument that the lack of fingerprints and other evidence tying Pineda to the drugs is sufficient to raise a reasonable doubt. [RT I 80-81; ER 99-100; SER 5, 11-12.] Accordingly, Agent Villars' very brief testimony regarding the compartmentalization of function within the drug smuggling business was clearly relevant to the crimes charged and to the factual issues involved in this case, where Pineda stood accused of importing marijuana into the United States (Count 1) and possession with the intention of delivering it to somebody else (Count 2).

3. Campos Supports the District Court's Pretrial Ruling That Limited Testimony Regarding the Compartmentalization of a Drug Smuggling Organization Is Admissible

In United States v. Campos, 217 F.3d 707, 712 (9th Cir. 2000), this Court affirmed, under an abuse of discretion standard, a district court's pretrial ruling and subsequent admission of expert

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SOMEHOW, TOOK IT TO SOME GARAGE AND SECRETED 42 POUNDS OF MARIJUANA WITHIN THE VEHICLE. THAT'S JUST NOT A REASONABLE EXPLANATION. THAT'S SOMETHING THAT IS BASED ON SPECULATION AND A CHAIN OF NEVER ENDING WAYS.

THIS IS A SUBSTANCE THAT AGENT VILLARS TOLD YOU IS WORTH SOMEWHERE IN THE NEIGHBORHOOD OF $30- TO $50,000. IF YOU ARE A DRUG SMUGGLER, ARE YOU GOING TO BRING YOUR PRODUCT IN THE UNITED STATES BY TAKING YOUR $30- TO $50,000 PRODUCT, HIDING IT IN A CAR, SOMEONE WHO DOESN'T KNOW ABOUT IT, STICK IT IN THERE, ESPECIALLY IN A MANNER WHERE THE AIR-CONDITIONING AND THE DEFROST SYSTEM IS NOT GOING TO WORK. WHAT'S THE FIRST THING YOU ARE GOING TO DO IF YOU GET IN THE CAR AND IT IS NOT WORKING? YOU ARE GOING TO EXAMINE IT A LITTLE MORE CLOSELY, AND THEN WHAT'S GOING TO HAPPEN YOU CAN DETERMINE THERE IS MARIJUANA, AND YOU ARE GOING TO GO TO LAW ENFORCEMENT. THAT WOULD BE JUST A VERY RISKY WAY FOR YOU TO GET YOUR PRODUCT TO MARKET HERE IN THE UNITED STATES BY SECRETING IT IN THAT MANNER.

SECOND, IT IS JUST A VERY RISKY WAY TO DO BUSINESS. YOU ARE GOING TO PUT THIS MARIJUANA IN THE CAR AND THEN HOPE YOU FIND THE GUY SOMETIME LATER. YOU ARE GOING TO SNEAK IT IN FROM TIJUANA AND TRY TO CATCH UP WITH HIM. YOU HAVE NO IDEA WHERE HE IS GOING, WHAT HE IS DOING. HOW ARE YOU GOING TO FIND YOUR PRODUCT? IT JUST DOESN'T MAKE SENSE WHEN YOU GOT SOMETHING WORTH THAT MUCH MONEY. YOU ARE A SOPHISTICATED DRUG

ORGANIZATION, YOU ARE NOT GOING TO BRING IT TO MARKET IN THAT MANNER, BECAUSE IT DOESN'T MAKE SENSE, AND IT'S NOT A REASONABLE WAY TO DO BUSINESS.

THE THIRD REASON WE KNOW THAT THE DEFENDANT KNEW THAT IT WAS MARIJUANA WAS HE WAS NERVOUS. WHEN HE WAS ENCOUNTERED BY INSPECTOR CRUZ WHEN HE CROSSED THE BORDER HE WAS NERVOUS. WHY WAS HE NERVOUS? HE WAS NERVOUS BECAUSE HE GOT CONTRABAND IN THE VEHICLE. HE WAS AVOIDING EYE CONTACT AND HIS VOICE WAS IN DISTRESS.

MR. WINTER IS GOING TO ARGUE UP AND DOWN, AND IT IS A DIVERSION. YOU CAN THINK ABOUT IT FOR WHAT IT IS WORTH. WE LIVE IN A VERY MODERN AGE WHERE PEOPLE USE WORD PROCESSORS, AND THERE MIGHT HAVE BEEN A TYPO IN INSPECTOR CRUZ'S REPORT. AND MR. WINTER IS GOING TO SAY BECAUSE THERE IS A TYPO IN THE REPORT, HE CANNOT BELIEVE HIM THAT THE DEFENDANT WAS NERVOUS. BUT YOU ARE GOING TO HAVE TO MAKE YOUR OWN INDEPENDENT CONCLUSION ABOUT THAT, BUT I WOULD ASSERT TO YOU INSPECTOR CRUZ TESTIFIED FROM THE STAND THAT OUT OF THE THOUSAND VEHICLES HE SEES THERE IS MAYBE ABOUT FIVE OUT OF EACH THOUSAND THAT THERE IS A HIT AND ARREST AND PAPERWORK GENERATED. IT'S A BIG EVENT FOR THEM, AND HE HAD INDEPENDENT RECOLLECTION OUTSIDE OF HIS REPORT THAT MR. PINEDA WAS THE ONE DRIVING THE VEHICLE AND THAT MR. PINEDA WAS INDEED NERVOUS WHEN HE ENCOUNTERED HIM ON AUGUST 2ND, 2000.

SECONDLY AND IMPORTANTLY -- AND THIS IS A SUBTLE

THE WITNESS: THEN YOU HAVE THE PEOPLE WHO WAREHOUSE IT AT THE BORDER WHO STORE IT, AGAIN THE PEOPLE WHO BREAK IT DOWN INTO SMALLER PACKAGES, PEOPLE WHO SHAPE THE PACKAGES FOR THE VEHICLE, THE TYPE OF CONVEYANCE THEY ARE USING, PEOPLE WHO PROCURE THE VEHICLES, WHO HIRE THE DRIVERS, WHO RENT THE HOUSES ON THIS SIDE OF THE BORDER, THE STASH HOUSES, TO SECURE THEIR PRODUCT ONE THEY GET HERE. EVERYBODY HAS A SPECIFIC TASK.

Q. WHAT'S THE PURPOSE OF THE DRUG SMUGGLING ORGANIZATION?

A. LIKE ANY OTHER CORPORATION, TO MAKE MONEY.

Q. HOW DO THEY DO THAT?

A. BY BRINGING THE PRODUCT NORTH.THE DEMAND AND THE PRICE IS HIGHER IN THE UNITED STATES, AND ALL THE EFFORT IS TO MAKE MONEY. THAT'S WHY IT COMES SOUTH AND NORTH. IT'S SUPPLY TO DEMAND.

Q. IN YOUR 13 YEARS OF NARCOTICS ENFORCEMENT, HAVE YOU EVER KNOWN OF A CASE OF SOMEONE SMUGGLING MARIJUANA FROM THE UNITED STATES TO MEXICO?

A. NO, SIR.

Q. WHY NOT?

A. AGAIN, IT IS A LOT CHEAPER DOWN THERE. YOU MAKE MORE MONEY UP HERE, AND THAT IS THE SUPPLY COUNTRY AND THAT IS THE SOURCE COUNTRY. I MEAN, THE DEMAND IS UP HERE. THAT'S THE SOURCE AND THEY BRING IT UP HERE.

Q. AND ARE YOU FAMILIAR WITH THE TERM "PERSONAL USE AMOUNT OF